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Introduction: The Internet and the Sovereign State: The Role and Impact of Cyberspace on National and Global Governance Symposium

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Symposium Introduction

The Internet and the Sovereign State: The Role and Impact of Cyberspace on National and Global Governance

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INTRODUCTION

Developments in technology have long had effects on states and international relations. Technological superiority, for example, played a role in the ascendance that European countries gained over other peoples during imperial conquests. Technological changes have had impact as well on fundamental aspects of international intercourse, such as trade and war. The growing debates about the impact of the revolution in new information technologies, especially the Internet, belong to this older phenomenon of technology affecting the dynamics of international relations. Yet, the literature examining the impact of cyberspace on international relations contains features that are historically unique and deserve special attention. A common theme in the cyberspace literature is that the Internet constitutes a threat to the traditional cornerstone of international politics: the sovereign state. What role the Internet plays in, and what impact it has on, national and global governance form the central concerns of the papers prepared for this Symposium.

THE LEAD PAPER

The catalyst for the analysis in Symposium papers is the article by Dean Henry H. Perritt, Jr. entitled *The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strengthening National and Global Governance*. Perritt observes that “[t]he developing conventional wisdom seems to be that the Internet is joining the assault on sovereignty and will, perhaps more than any of the other globalization forces, contribute to relegating sovereignty and its

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traditional trappings to the ash heap of history.”¹ Perritt challenges this conventional wisdom “by arguing that the Internet has the potential to strengthen national and global governance—thus enhancing sovereignty rather than destroying it.”² His challenge is informed by liberal international relations theory as Perritt finds fault in thinking about the Internet’s effects on international relations through the lens of realism. Connecting discourse about the Internet with liberal international relations theory creates for Perritt the need not only to understand the peculiar technological nature of the Internet but also to rethink concepts of sovereignty. Sovereignty conceived through the lens of liberalism gives the Internet more potential to enhance (1) national governance by strengthening the Rule of Law, and (2) global governance by strengthening international law, deepening economic interdependence, empowering non-state actors, and improving international security mechanisms. Perritt’s analysis forces us to understand that how we view cyberspace is directly colored by how we more generally perceive sovereignty and the nature of international relations.

THE COMMENTARIES

The *Indiana Journal of Global Legal Studies* invited leading scholars from different disciplines to respond to Perritt’s article either by directly addressing issues Perritt raised or taking the discussion about the role and impact of cyberspace on national and global governance in new directions not addressed by Perritt. In large measure, each respondent did both, which has produced a stimulating collection of arguments and reflections on the Internet, sovereignty, and international relations. The six papers that follow Perritt’s article are presented in alphabetical order by the author’s name; the richness and diversity of the approaches taken by the respondents stymied the Editor’s efforts to align them in a more substantive arrangement.

Keith Aoki’s contribution³ questions Perritt’s appeal to liberal theory in thinking about the Internet and argues that liberalism must be critically analyzed to reveal how its language and concepts hide emerging tensions in sovereignty and its expression in international relations on the cusp of the new millennium.

1. Henry H. Perritt, Jr., *The Internet as a Threat to Sovereignty? Thoughts on the Internet’s Role in Strengthening National and Global Governance*, 5 IND. J. GLOBAL LEGAL STUD. 423, 424 (1998).

2. *Id.*

3. Keith Aoki, *Considering Multiple & Overlapping Sovereignties: Liberalism, Libertarianism, the National Sovereignty, “Global” Intellectual Property, and the Internet*, 5 IND. J. GLOBAL LEGAL STUD. 443 (1998).

Aoki analyzes current trends “that have produced multiplying, overlapping, and mutating sovereignties”.⁴ The Internet plays a role in these trends, but Aoki argues that it has to be placed in context with the larger forces at work rather than singled out as a unique or special threat to sovereignty. Aoki gives his general observations specificity by applying them to the controversies surrounding the protection of intellectual property in the era of globalization through the “upward harmonization” strategy produced by liberalism.

Jack Goldsmith’s essay⁵ hones in on one of the most frequent notions in cyberspace discourse—that territorial regulation of Internet activity by sovereign states is not feasible or legitimate. The idea that Internet activity escapes the control of territorially-based sovereignty plays a large role in arguments about how the Internet undermines state sovereignty. Like Perritt, Goldsmith challenges conventional wisdom by arguing “that as a general matter, territorial regulation of the Internet is no less feasible and no less legitimate than territorial regulation of non-Internet transactions.”⁶ In taking this approach, he forces us to reconsider claims that the Internet produces new spaces or worlds somehow removed from other human interactions. Territorial regulation, Goldsmith observes, is difficult for many types of transnational transactions, not just Internet communications. Using lessons learned from territorial regulation of non-Internet, international transactions, Goldsmith argues that the Internet does not destroy territorial sovereignty. He observes that some of the supposedly novel features of the Internet, such as ease with which territorial regulations are evaded, also appear in the “real spaces” of international relations. Although the Internet adds to the complexity of territorial regulation in an interdependent world, “the Internet is no more likely to undermine national sovereignty than did the telephone or satellite or television.”⁷

The anthropologist Bill Maurer challenges two aspects of Perritt’s analysis: (1) the liberalism vs. realism debate in international relations theory that is important to Perritt’s arguments, and (2) Perritt’s claims about the positive

4. *Id.* at 447.

5. Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 *IND. J. GLOBAL LEGAL STUD.* 475 (1998).

6. *Id.*

7. *Id.* at 491.

benefits of economic interdependence.⁸ Maurer questions Perritt's reliance on liberalism and identifies other international relations theories, such as constructivism, that force reconsideration of liberal assumptions and values. He connects these theoretical trends in international relations theory with the impact that the Internet may be having on the subjects of liberal sovereignty: individuals. Anthropological approaches help reveal the construction of virtual personas within multiple-user domains that exist simultaneously with other "real life" personalities. Individuals become "dividuals"⁹—persons defined by relationships not by abstract, autonomous conceptions of the self. Maurer argues that dividuals confront traditional liberal thinking about democracy and markets with dilemmas. He uses examples from Caribbean offshore finance and banking facilitated by Internet technology to examine the fluidity developing in the liberal conceptions of citizen, market, sovereignty, and state.

David Post combines the old and the new in discussing how the Internet relates to the "unsettled paradox" concerning sovereignty in liberal political thought.¹⁰ Post suggests "the Liberal theory itself contains a set of often unacknowledged normative premises that pose a deeper peril for the institution of statehood than Perritt suggests."¹¹ Post aims to show how the new realities of the Internet "affect our normative justifications for the existence of the state itself."¹² In doing so, he takes us back into the theoretical controversies surrounding the concept of sovereignty in liberal political thought. Post claims that the liberal theory of sovereignty does not necessarily lead to the construction of a liberal state because the state derives from the consent of the governed, who actually possess sovereignty. The liberal theory of sovereignty creates interesting possibilities for governance in cyberspace that are not state-based but are based on Internet access providers and Internet users. Considering the non-geographical world of cyberspace, according to Post, helps us understand that "[t]he proper presumption for a Liberal theory would seem to be a presumption of *a-territoriality*; a law's reach is confined and bounded ultimately by the network of those who have participated in its adoption and

8. Bill Maurer, *Cyberspatial Sovereignties: Offshore Finance, Digital Cash, and the Limits of Liberalism*, 5 IND. J. GLOBAL LEGAL STUD. 493 (1998).

9. *Id.* at 502.

10. David G. Post, *The "Unsettled Paradox": The Internet, the State, and the Consent of the Governed*, 5 IND. J. GLOBAL LEGAL STUD. 521 (1998).

11. *Id.* at 527.

12. *Id.*

consented to its application.”¹³ Post argues that “[s]ettlement of aterritorial cyberspace” will lead to new questions about and reconsideration of the nature of sovereign power and the role of the state in Internet governance.

In her contribution, Saskia Sassen takes issue with Perritt’s understanding of the architecture of the Internet and with his conception of sovereignty.¹⁴ In terms of the architecture of the Internet, Sassen raises the concern that the Internet has been changing from its earlier phase of openness and interconnectivity to a emerging trend of “private appropriation and use of the Internet.”¹⁵ She argues that the commercialization of the Internet “may in fact have negative consequences for the civic and political potential of the Internet, and, in that regard, negative impacts on the Liberal state agenda.”¹⁶ Cyberspace commercialization threatens the universal democratic potential of the Internet. Such commercialization also raises the need to distinguish between private and public digital spaces and to recognize the phenomenon of “cyber-segmentation”,¹⁷ both of which lead to unequal conditions of access to cyberspace. Sassen also believes that Perritt’s conception of sovereignty, like his presentation of the Internet, is static and linked too much to traditional concepts of the state or traditional debates between liberals and realists. Globalization, and the Internet’s role in this process, are fundamentally changing the nature of the system of states, if not the states themselves. The global digitization of finance¹⁸ not only has real impact on states but also carries with it normative messages that implicate concepts of legitimacy, equity, and democracy. Private digital spaces, such as those that facilitate the movement of capital around the world, currently hold more power and influence than the public digital spaces on the Internet, which Sassen argues is cause for concern.

Joel Trachtman’s essay¹⁹ picks up on Perritt’s thoughts on the relationship between technology and sovereignty and depicts “the problem of sovereignty as

13. *Id.* at 542.

14. Saskia Sassen, *On the Internet and Sovereignty*, 5 *IND. J. GLOBAL LEGAL STUD.* 545 (1998).

15. *Id.* at 547.

16. *Id.* at 548.

17. *Id.* at 551.

18. *Id.* at 554.

19. Joel P. Trachtman, *Cyberspace, Sovereignty, Jurisdiction, and Modernism*, 5 *IND. J. GLOBAL LEGAL STUD.* 561 (1998).

a problem of institutional competence.”²⁰ Using techniques developed in institutional economics and law and economics, Trachtman explores the relationship between the technical production frontier, which is set by technology, and the structural production frontier, which is established by institutions. Cyberspace itself neither demeans nor preserves sovereignty; it is neutral. Questions of cyberspace’s impact on sovereignty and the state have to be analyzed in connection with institutional responses to the new technological challenges. The central institutional question in cyberspace regulation is jurisdiction: how to regulate the Internet horizontally in the international system and vertically within a given country. Here is where Trachtman brings to bear on the theory of the state thinking from the theory of the firm. This analysis, Trachtman believes, forces us to see “that cyberspace has helped us, by educating us to the disutility of concepts of sovereignty, territoriality, and extraterritoriality.”²¹ Institutional approaches to the problem of jurisdiction have to be rethought because of the bulge in the technical production frontier caused by the Internet. Trachtman believes that we need to focus more seriously on how cyberspace alters “the transaction costs and benefits profile of various social and private arrangements.”²² Some alterations will need to be met by public regulations (be they national, international, or through the process transgovernmentalism), but others might be better suited for private regulation, *à la* the *lex mercatoria*. Cyberspace, Trachtman concludes, has created an occasion to revise the construction of both sovereignty and jurisdiction.

CONCLUSION

The Symposium’s papers raise and analyze a host of technological, political, economic, anthropological, legal, and philosophical issues that emanate from the impact of the Internet and cyberspace on the sovereign state and conceptions of national and global governance. The papers show that the discourse about the Internet must involve more than the abstract debates about whether cyberspace undermines the state and its exercise of sovereignty. The nature of each state is important, as is the philosophical basis for each state’s conception of sovereignty. But philosophical assumptions, explicit and buried, also deserve critical attention to avoid complacency about the future role of the

20. *Id.* at 562.

21. *Id.* at 576.

22. *Id.* at 580.

Internet in international relations. The ongoing shaping of cyberspace into public and private digital spaces forces us to see the Internet as an arena in which power and legitimacy clash. How the Internet variously affects institutions and individuals, from transactions costs to virtual personas, also plays into the analysis. Nor can traditional concepts and practices of sovereignty be forgotten as they still have relevance even in the face of the revolution in information technologies. Perritt perhaps captures best the overarching message of the Symposium's papers when he writes that "thinking about the role of cyberspace in national and global governance forces renewed consideration of the underlying assumptions we have about the nature of the state and international relations and about the construction of images of the world preferred."²³

23. Perritt, *supra* note 1, at 442.

