The New Cyber-Conservatism: Goldsmith/Wu and the Premature Triumphalism of the Territorial Nation-State

A review of Goldsmith and Wu's Who Controls the Internet? Illusions of a Borderless World

Reviewed by Milton L. Mueller

This is a book that needed to be written. I like what it contributes to the debate on internet governance. But I do not like what is likely to be its political impact on that debate.

Thanks to Goldsmith & Wu, students of Internet governance can no longer breathlessly assert that the Internet changes everything with respect to governmental authority and territorial jurisdiction. They do a particularly good job of skewering two of the most egregious and persistent fallacies associated with Internet politics. One is the idea that it is "impossible" to control the Internet, with the corollary that the mere presence of TCP/IP in a country spells eventual doom to all forms of tyranny. They make short work of this claim. In a particularly pungent contrast, they describe Bill Clinton's claim during a visit to China that censoring the internet is like "nailing Jello to the wall." Virtually the same time as this smug claim was being made a very effective government crackdown on Chinese Internet-based dissidents was taking place.

The other fallacy is the idea that in cyberspace technology somehow makes the problems of politics and governance go away. Here we refer to the cyber-optimists' vision of superabundant resources and self-governing virtual communities that resolve all problems via consensus, with no exercise of compelling authority and no distributional conflicts leading to relative winners and losers. If you don't like the results in one community, this view seems to imply, you simply move to another, so your choice is never really constrained. As attractive as that vision is, it is unrealistic. There are always bottlenecks or strategic levers inherent in the structure of any technological system, and there are always sunk costs and important forms of scarcity present, both of which can be exploited for their political, economic or behavioral leverage. The most obvious case in point for the Internet is the DNS root, a topic I have written about in depth. Control of the root provides the leverage for asserting various forms of policy control; e.g., over domain name trademark conflicts, user surveillance functions, and entry into the domain registration market.

Aside from the opportunities for control and political conflict that are inherent in any large-scale technological system, Goldsmith and Wu point out very effectively that we never fully escape the need for some kind of coercive authority to enforce basic rules against stealing, fraud and violence. Their chapter contrasting the clean, effective development of Apple's iTunes service with KaZaa's descent into a spyware-laden hell is particularly effective in this regard. If anyone needed to be reminded that "rules are better than anarchy," this book turns the trick.

But what kind of rules, and who makes them? That's the question most of us are asking now. Here the book disappoints.

Insofar as it deals with those questions at all, it offers a value-free traditionalism which shades into an apologia for the existing nation-state system. If the internet was a revolutionary force – and in spite of themselves the authors' own arguments support the view that it was – this book risks being a manifesto for counterrevolution. Its arguments rationalize the existing institutions of national sovereignty without providing any theoretical or normative basis for improving them in the light of the transnational capabilities of new information technology. Their positive argument that governments can and in some cases must regulate can easily be turned into a normative argument used by established power holders in states to assert forms of control that are neither necessary nor desirable.

Goldsmith and Wu don't have much to say about the positive virtues of the Internet's unexpected escape from institutionalized mechanisms of control during the 1990s. The Internet's assault on national sovereignty in communication is presented almost as an inexplicable aberration in world history. Now order is being restored, they imply, and thank God for that! While recognizing the "vices" of governmental control, particularly in their chilling chapter on China, the basic message is to praise a "bordered Internet" and to claim that "decentralized rule by nation-states reflects what most people want." Their key claim is encapsulated in this sentence:

> Public goods and related virtues of government control of the Internet are necessary across multiple dimensions for the Internet to work, and as a practical matter only traditional territorial governments can provide such public goods.

I call this *the new cyber-conservatism*. By using this term I do not mean to align Goldsmith and Wu with the Republican Party, Ronald Reagan, or any other uniquely American warp on the term. I use the term *conservatism* in its most basic and literal sense: as something that favors retaining the status quo, something resistant to change. They might also be called conservatives in the Hobbesian sense. At any rate, this cyber-conservatism needs to be questioned on both factual and normative grounds.

The important issue raised by Internet governance is the degree to which it promotes institutional change, both domestically and internationally. Goldsmith and Wu offer a useful antidote to the naïve technological determinism of the old cyber-libertarians. But

they offer no theory of institutional change themselves. While their arguments repeatedly recognize that the Internet created some kind of political disequilibrium in relations among states, they are more interested in downplaying the significance of that than in exploring where it might lead us.

Let us speak for a moment of equilibrium and disequilibrium, because this physics metaphor offers the best way of thinking about the relationship between technology and broader forms of social change. Internet technology does not by itself "cause" institutional change, as some kind of exogenous actor that pushes it in a specific direction. The introduction of a new technological system disturbs the equilibrium of existing institutions. It rearranges and sometimes totally scrambles social relations. A radical technology like the Internet shifts the kinds of methods needed to retain control and also the incidence of costs and benefits. For a while, when its effects are new and unanticipated, it empowers in a relative sense some actors at the expense of others. This relative empowerment alters the composition of interest groups, further promoting political change. But powerful actors like states react and adjust their methods, and after a while a new equilibrium may be established. States rediscover what they can do to retain control of things they really want to control. The interesting questions for a political economy of institutional change are: how forceful is the initial disturbance in the equilibrium and what made it more or less forceful; how far do the adjustments need to go to re-establish an equilibrium; how radical are the relative realignments of power and wealth; and how different is the new equilibrium from the old one?

Goldsmith and Wu do not attempt to answer any of these questions. They seem to be more interested in rationalizing the traditional nation-state, and in driving yet another stake through the heart of poor old John Perry Barlow. This short-sightedness is evident in a review of their main themes.

The authors provide a solid discussion of extraterritorial effects. Here they provide a valid and useful counterargument to the view that unilateral exercise of jurisdiction by a state will necessarily lead to a global cascade into the lowest common denominator of regulation. They note that the ability of governments to control Internet activity is limited to what can be controlled via local intermediaries, local assets and local persons. But as usual, the thrust of their argument is conservative; it downplays the significance of the Internet disequilibrium. They do not acknowledge that in an increasingly global and interdependent economy and society, the concept of how one is or is not "local" may need revision. Nor do they provide any measurement criteria for assessing the costs and benefits of extraterritorial effects. Given their own examples – e.g., the brakes put on mergers in major industries or the need of multinational content providers to watch their step – the effects are not trivial.

In their quest to keep us all happily corralled into national legal cattle pens, they offer a norm-free assessment of national control, a utilitarian "greatest good for the greatest number" calculus. If a 2/3 majority of people in one territorial state want, say, to censor Nazis, or wipe out all references to women's rights, or require all web sites to display the official portrait of the country's grand poobah, then fine; there are lots of other states

where the population preferences may differ, and it's better to have multiple, different solutions than one global solution that will not make everybody happy.

There is merit in that argument, but there are also grave questions about morality and human rights. To their credit, they at times confront squarely the existence of authoritarian states that will make decisions about what is allowed on the Internet without any reference to the desires or rights of the population subjected to their control. But despite their long discussion of China, which by itself accounts for nearly 20% of the world population, the book implies that this is a peripheral problem. It is not. More fundamentally, there is no escape from value judgments here. They criticize the global extension of the First Amendment and its implied universalism. But why *not* extend it globally? If you believe that individuals have rights that are over and above those of states, how does the fact that a (possibly temporary) majority happened to seize political control in one territory for a few years alter the basis of the claim? And if you believe that it is illegitimate to apply the First Amendment standard globally, why is it legitimate to apply Goldsmith and Wu's amoral utilitarian standard? Some standard has to be applied.

The authors conflate the increasing technological capacity for localized awareness on the Internet with the issue of conformance to political boundaries. The two are related, of course, but they are not the same. A great deal of geographical awareness on the internet has been produced purely by market forces, as it can add tremendous value to users and suppliers. And yes, that technological capacity can be used to aid efforts to align human conduct on the Internet with political boundaries. But the latter kinds of geographical content discrimination have no close connection to user demand or network efficiency. It is costly to conform to those boundaries, and whether those costs are worth bearing is a question worth asking. Just as uniform technical standards drastically reduce the cost and ease of use of telecommunication and other forms of information technology, so do uniform legal standards. A great deal of litigation, risk, confusion and cost could be avoided if globally applicable rules could be established and enforced. The rise of other technological infrastructures, such as the railroad, telephone and telegraph, led to (and is still leading to) the transcendence of more localized forms of jurisdiction; e.g., from municipal to state regulation, and from state to federal jurisdiction. One of the great triumphs of TCP/IP, unacknowledged anywhere in this book, was the stealth globalism of its standards and the community that built them. It makes for a great contrast with the more politically-formulated, nationally-rooted standards battles – and fragmentation – we have gotten in mobile telecommunication services, to use just one example. Their assertion that uniform global standards implies a central government that homogenizes everything is refuted by experiences with federal structures and limited forms of interoperability, which articulate without homogenization. Here again the absence of a more creative institutional perspective limits the value of the book.

Goldsmith and Wu's discussion of internationalism is interesting, both for its omissions as well as its commissions. ICANN stands as a simple and obvious refutation of their claim that "only traditional territorial governments" can provide the governance needed to make the internet work. They call attention to the unilateral oversight exercised by the U.S. government, but recognizing the powerful role of a state does not avoid the

conclusion that this is a new, global kind of institution. Moreover, they seem to accept the need for an ICANN, i.e. a globalized administrative and policy making mechanism, which contradicts their repeated assertions that there is nothing new about the internet and its impact on governance. More constructively, they call attention to the constraints that operate on the creation of effective agreements among states. Here, using the Cybercrime Convention as their example, they make an explicitly positive, as opposed to normative, argument that we are more likely to get unilateral interventions with varying amounts of extraterritorial effects than we are to get sweeping international conventions.

In sum, this is a good book and you should read it, but avoid jumping on any bandwagons just yet. Whether the authors intended it to or not, this book will encourage a kind of triumphalism among national authorities who want to regulate the internet. We have already seen attempts by some parties to make sure that IP addresses are allocated and assigned on a national basis. On what basis would this effort be resisted if you believe that territorial sovereigns should be in control? No big deal, Goldsmith and Wu seem to imply, just the "inevitable" exercise of unilateral regulation.

I predict that if this tide of national control gains traction, after a few years we are all going to become very nostalgic for the cyber-libertarianism and optimistic globalism of the old Internet. The triumphalism of this book is premature. Whether governments and their interventions are, on net, making the internet more orderly and productive or are simply ripping it apart with politics, regulating it to death, reestablishing protected monopolies and cartels, and competing ever more ferociously for national advantage at the expense of global public interest remains to be seen. And whether new global institutions around the Internet, including ICANN, can mediate those impending storms will be an interesting test. This book doesn't offer much of a compass for navigating those stormy waters.