

Internet Governance Wars, Episode II: the Realists Strike Back

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



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Jack Goldsmith and Tim Wu's new book *Who Controls the Internet? Illusions of a Borderless World* has been cited in places as diverse as the Public Broadcasting System in the United States and a consultative meeting on the Internet Governance Forum in Geneva, Switzerland. When I read it, I immediately thought of the Star Wars Saga with its sequence of episodes and saw a trilogy of three episodes in the Internet governance wars. Goldsmith and Wu begin by attacking Episode I, which was about the origins of the Internet as the product of a non-state community, as having a hopelessly flawed structure, based on a belief that the Internet would be borderless, states would be unable to control it and the Internet would lead to the flat earth that Thomas Friedman celebrates. Goldsmith and Wu have fashioned Episode II, where the primacy of the territorial state is celebrated, the impossibility of international governance is pronounced and the virtues of a segmented, if not round, at least non-flat earth are proclaimed.

As someone who has looked at Internet governance from the perspective of international relations theory rather than law, the two episodes reflect a long theoretical debate about the nature of the world. The correct title of Episode I in this debate would be "the Idealist Menace - The Netizens Take Charge". After both World Wars I and II, some scholars argued that world order could and would be created by eliminating national barriers, through international institutions and international law. This was epitomized by Louis Sohn and Granville Clark's *World Peace through World Law*. As characterized by Goldsmith and Wu, the original founders of the Internet, like Vint Cerf, Bob Kahn, Jon Postel and the Internet Society saw Internet governance as begin essentially non-state in character, built around the positive values of the netizens. Goldsmith and Wu dismiss this idealism with a sequence of cases and anecdotes where governments intercede with Internet management and restrict total freedom. In their book, Episode I ends with governments taking charge.

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The antithesis of idealism in IR theory was realism. Realists were scholars who said that international relations were exclusively between territorial states which had sovereignty and could exercise coercive force. They would act in national interest derived from their history, the preferences of their influential citizens and the perceptions of their leaders of what would be, in each country, the public good. Applied to the Internet Goldsmith and Wu see this as happening and that it is a good thing. Their analysis could be Episode II: the Realists Strike Back. Governments, based on their relative power and national interest, will rule the Internet. Take that, Queen Amidala, Princess Leia and Luke Skywalker!

The authors of the study are real realists. Currently professors (respectively at Harvard and Columbia), both have worked for the United States Department of Justice in the Bush Administration and clerked for members of the United States Supreme Court. Their book was launched in April 2006 at the American Enterprise Institute, a realist stronghold, with David Gross, who headed the US negotiating team at the Tunis Summit as one of the discussants. Goldsmith is also the co-author of *The Limits of International Law*, about which [Oxford Press](#), its publisher, says: “In this book, Jack Goldsmith and Eric Posner argue that international law matters but that it is less powerful and less significant than public officials, legal experts, and the media believe. International law, they contend, is simply a product of states pursuing their interests on the international stage. It does not pull states towards compliance contrary to their interests, and the possibilities for what it can achieve are limited. It follows that many global problems are simply unsolvable.”

The realist case is that Internet governance can only be provided by governments, and the examples used, including what happened to the Memorandum of Understanding on global top-level domain names in 1998, various cases on intellectual property, libel (the Gutnick case), website content (the Yahoo case), show clearly that today governments – or more precisely governments of large and powerful countries – can affect the Internet. The basis for this power is the ability of governments to coerce compliance with their laws. Goldsmith and Wu do not say that the system is perfect. Their long chapter on China’s efforts to control Internet content shows that not all governments are necessarily good, they seem a bit embarrassed by the Recording Industry Association of America (RIAA) suing thousands of individuals who couldn’t afford to respond to the lawsuits to stop music downloading, and the risk that some countries could use restrictive laws to attack speech in third countries might be hovering. They also lament that part of the Westphalian system is composed of states that are too small and “will lack the economic capacity to provide public goods like national defense and education.” (p. 153). (They suggest that these small states combine themselves into larger ones.) Like all good realists, Goldsmith and Wu accept these flaws as the cost of doing business.

Like many of the writers on Internet governance whose experience is almost exclusively in the United States itself (although Wu’s [Columbia University biography](#) does say that he once “taught at the United Nations Development Program in Katmandu, Nepal and taught at Kyushu University in Fukoka, Japan.”), they do not seem to have a clear

understanding of the way the international system works outside the United States. This is shown in their analysis of what they call the “failure of the cybercrime convention”, an international treaty negotiated within the Council of Europe. They note that only European countries have ratified the convention and express surprise that no other countries have. Of course, any treaty negotiated under the Council of Europe is non-universal, non-member States would not have been part of the negotiations and therefore would have no incentive to become parties to the Convention. They also give short shrift to the very complex discussions of the World Summit on the Information Society, other than to note the United States position on the root servers and to refer to the Internet Governance Forum. They ignore the work of the Working Group on Internet Governance, whose conclusions strongly informed the outcome of the Summit, probably because the WGIG was not formally composed of governments (and, in fact, the United States did not send a governmental representative to it).

There are clearly enough issues, especially having to do with freedom of expression – as Goldsmith and Wu also note -- where national laws are strongly in conflict and affect how the Internet functions. There are also areas like cyber-crime, where national laws do not suffice. However, Goldsmith and Wu close Episode II with the words “In the coming decades, these factors, and the consequent struggles between nations and their national network ideologies, will do much to determine how life on the bordered Internet is lived.”

This Hobbesian vision of Internet governance, fortunately, is probably shared only by the realists in the current United States government and its academic supporters. The world of the Internet, like most issues that cross international borders like trade, climate, the environment, weapons proliferation, and humanitarian assistance, is not one in which states struggle with each other. Instead, the international system is based on cooperative solutions, formed around sets of agreements that are called international regimes. It is time for Internet governance, episode III. This can be called “Return of the Regime Theorists”.

Regime theory first emerged strongly in the early 1980’s, and was used to explain a series of trends in which governments decided that a cooperative solution to certain problems was preferable to conflict. These included the environment and law of the sea. However, events of the time did not seem to favor the regime explanation of international relations: regimes seemed to be weak, easily passed by stronger states and much affected by the East-West conflict. With the end of the Soviet Union, regimes were increasingly created, built around universal international conventions, to create order based not on coercion but rather on legitimacy. When Barnett and Finnemore wrote *Rules for the World* in 2004, they were reflecting a new reality: governments in states of all sizes have found it preferable for their citizens to reach agreements on rules that will govern the behavior of both states and non-state actors.

These have begun to affect the Internet as well. Goldsmith and Wu note that Antigua and Barbuda successfully appealed a US attempt to regulate Internet gambling under the WTO Dispute Resolution Procedure, set up in the mid-1990’s after the end of the Uruguay Round of trade negotiations. There has been a general strengthening of the

international human rights regime that, among other things, guarantees freedom of expression (what Goldsmith and Wu would call First Amendment Rights) as a condition for a state being part of the international community. Conventions place binding obligations on states to live up to the provisions to which they agree. The obligations undertaken under one regime will affect those in other, related regimes. While most developed countries – and most developing as well – become parties to these conventions, the United States is the state least likely to accept conventions, a situation that is increasingly becoming costly to that country.

There is, however, as yet no Internet governance regime, although the first steps towards creating one have been taken. Conflicts between other regimes like trade, intellectual property and human rights have already begun to emerge, placing individual state behavior into a situation of ambiguity. The Internet Governance Forum, to which Goldsmith and Wu refer, was set up with an intention of helping define a governance regime. The Tunis Agenda for Action, one of the final outcomes of the World Summit includes in its provisions a definition of Internet governance as “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.” Coincidentally, this is exactly how an international regime is defined in regime theory. All states that were present at Tunis – including the United States – have morally subscribed to the provisions of the Agenda.

Unlike agreements under a realist model that are backed by coercion, agreements in regime theory are usually be consensus, adopted because the total value of the agreement to each state in terms of international order is superior to the costs of individual elements. These agreements are growing in number and complexity. They are also growing in terms of the relative role of non-state actors. In the case of the Internet, there is an agreement among governments that, although the formal authority for agreements rests with governments under international law, corporations, non-governmental organizations and other parts of civil society have standing in a multi-stakeholder process. In that sense, the kind of widely based open governance of the Internet foreseen by the original founders is still both possible and likely in the emerging regime. Goldsmith and Wu, the regime theorists have returned (on the Millennium Falcon?) and the Internet will not be the same again.