The "Unsettled Paradox": The Internet, the State, and the Consent of the Governed[1]

DAVID G. POST*

INTRODUCTION

We live, as the Chinese proverb would have it, in interesting times, at least for those who find questions like "What is sovereign power?" and "From where does the state obtain the authority to exercise that power?" to be interesting ones. How, if at all, will the communications revolution of the late twentieth century, in particular the rise of the Internet and a global cyberspace, affect our view of the organization of global politics and global polities?

Without doing too much injustice to the complexities of this most complicated set of questions, we can describe at least two divergent points of view. In one, the rise of cyberspace brings about the Twilight of the State, a kind of Wagnerian *Staatendammerung*. The institution of the nation-state itself, after a half millennium of dominance of the international political and legal arena, is relegated to the ash heap of history, done in—"disintermediated"[2] some might say—by the increasing irrelevance of the physical borders and boundaries that simultaneously circumscribe and define its proper sphere of action.[3]

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1. The "unsettled paradox" to which the title refers is the paradox of sovereignty itself. *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM (1993). "The ultimate question, at that time [in the years leading up to the drafting of the Constitution] very much an unsettled paradox, was that of sovereignty: what sovereignty was, where it lay, and how people ought to think about it." *Id.* at 11.

* Temple University School of Law and Cyberspace Law Institute. Thanks to Joe LaBarge for research assistance in preparation of this paper. On a personal note, it is a particular pleasure to have the opportunity to reflect on the work of Dean Henry H. Perritt, Jr. I know that I am not the only scholar in the growing "law of cyberspace" camp for whom Dean Perritt has served as mentor and inspiration for many years, and I thank Dean Alfred Aman and the editors of the *Indiana Journal of Global Legal Studies* for the invitation to participate in this symposium.

2. *See infra* note 19 and accompanying text.

3. *See, e.g.*, JEAN-MARIE GUÉHENNO, THE END OF THE NATION-STATE (Victoria Elliott trans., 1995); John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903 (1996); Stephen Kobrin, *Electronic Cash and the End of National Markets*, FOREIGN POL'Y, Summer 1997, at 65. *See generally* WALTER WRISTON, THE TWILIGHT OF SOVEREIGNTY (1989). Some express this view more colorfully than others. *See* Catherine Yang, *Law Creeps onto Lawless Net*, BUS. WEEK, May 6, 1996, at 58 (citing John Perry Barlow, *A Declaration of the Independence of Cyberspace* (Feb. 9, 1996) <http://www.eff.org/pub/Publications/John_Perry_

The other view reports that the imminent death of the state is greatly exaggerated. After all, people possess an irreducible tangible reality, fixed in a material world and therefore subject to traditional forms of social control, including the entire legal apparatus of sovereign states.[4] The Internet may well constitute a "revolutionary" technology, calling for different modes of state intervention and regulation;[5] but just as the institution of the sovereign state adapted to earlier "revolutionary" communications technologies (the telephone, radio, television, and the like), so too will existing state institutions of governance and lawful control adapt to this one.[6]

Barlow/barlow_0296.declaration>). "Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of the Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather." *Id.*

Portions of my own work fall into this category. *See, e.g.*, David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1402 (1996) (arguing that cyberspace is a distinct "place" for purposes of lawmaking sovereignty, and that the law applicable to interactions and transactions in cyberspace "will not, could not, and should not be the same law as that applicable to physical, geographically-defined territories."); David G. Post, *Governing Cyberspace*, 43 WAYNE L. REV. 155 (1996) (suggesting that the geographical borders that define and constrain sovereign states cannot be made operative on the global electronic network).

Perritt aptly describes this as the "developing conventional wisdom." *See* 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, 423 (1998). Indeed, the rapidity with which this idea—this "meme", to use Richard Dawkins' phrase, see RICHARD DAWKINS, THE SELFISH GENE (1976)—with its seemingly radical implications has become "conventional" is itself evidence of the transformation in information velocity being wrought by the new information technologies. I leave for others to ponder the significance (if any) of the fact that the "Death of the State" viewpoint, once a centerpiece of Marxist doctrine and a rallying cry of the political "left", has, through a kind of intellectual free-agency, been picked up by those on the libertarian "right."

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> Cyberspace is a place. People live there. They experience all the sorts of things that they experience in real space, there. For some, they experience more. They experience this not as isolated individuals, playing some high tech computer game; they experience it in groups, in communities, among strangers, among people they come to know, and sometimes like. While they are in that place, cyberspace, they are also here. They are at a terminal screen, eating chips, ignoring the phone. They are downstairs on the computer, late at night, while their husbands are asleep. They are at work, or at cyber cafes, or in a computer lab. They live this life there, while here. And then at some point in the day, they jack out, and are only here. They step up from the machine, in a bit of a daze; they turn around. They have returned.

Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1403 (1996).

5. "The regulation [of cyberspace] will be of a different form; its techniques will have to become quite different. But if well designed, they will not be futile." *Id.* at 1406.

6. *See, e.g.*, Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. (forthcoming 1998); William H. Lash, *The Decline of the Nation State in International Trade and Investment*, 18 CARDOZO L. REV. 1011, 1023, 1025 (1996) (giving examples of "the nation state triumphing over multinational commerce" and suggesting that while "[t]he nation state may not be what she once was," questions of "sovereignty, national security, accountability, or even cultural tenets" lead to a conclusion that "accounts of the demise of the nation

Dean Henry H. Perritt, Jr., articulates what appears to be an intermediate position.[7] While he agrees with those in the first camp that the boundary-disregarding global network will produce dramatic changes in the international order, he argues that the institution of statehood itself will likely withstand this challenge. He suggests, however, that certain *kinds* of states, organized internally in particular ways that implement a particular vision of the source of their own power, will not.

Building upon the important theoretical work of Professor Anne-Marie Slaughter, Perritt's argument begins with the observation that there are multiple conceptions of sovereign power—of the ultimate source of *supreme* lawmaking authority from which no appeal is possible. In the traditional "Realist" view that has dominated international law and politics at least since the Treaty of Westphalia in 1648 and perhaps longer,[8] that power resides in sovereign states—*cujus regio, ejus religio*.[9] To the Realist, states are the sovereign actors in the international system, and the interstate relations that define the international order are fundamentally anarchic. This view defines a Hobbesian State of Nature in which no Leviathan imposes order on these individual sovereigns; indeed, that is precisely what makes them "sovereign." Power is the operative currency in this system—the capacity to wield power is the "ante for

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state are grossly exaggerated."); Timothy S. Wu, Note, *Cyberspace Sovereignty? The Internet and the International System*, 10 HARV. J. L. & TECH. 647, 649 (1997) (suggesting that "Internet regulation, although difficult, is possible and stands to become increasingly so regardless of its desirability on normative grounds" and that states will "reach a consensus regarding what can be termed a 'minimally sovereign' cyberspace."); Symposium, *The Future of the Federal Court: The Development and Practice of Law in the Age of the Internet*, 46 AM. U. L. REV., 327, 391-92 (1996) (discussing the notion that sovereign nation-state as primary decision-maker will endure increasing use and power of Internet); Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment In an Online World*, 28 CONN. L. REV. 1137, 1141, 1170-71 (1996) (arguing that although the Internet is vastly different than any other form of mass communication, existing law will adapt to this technology just as those laws adapted to television and radio).

7. I hereby exercise the Commentator's First Prerogative of restating, in terms more congenial to the commentator's own analysis, the central themes sounded in the symposium's main paper.

8. *See* Stephen J. Kobrin, *Back to the Future: Neomedievalism and the Post Modern Digital World Economy*, 51 J. INT'L AFF. (forthcoming 1998) (describing the conventional view that the Treaty of Westphalia marked the "origin of the modern state system [and] the replacement of overlapping, vertical hierarchies by horizontal, geographically defined sovereign states."); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 507 (1995) [hereinafter Slaughter, *International Law*] (stating that Realism is the "dominant approach in international relations theory for virtually the past two millennia, from Thucydides to Machiavelli to Morgenthau.").

9. "Look only to the prince and no farther." *See* Slaughter, *International Law*, *supra* note 8, at 537 (noting this was the "founding principle of the Westphalian system.").

participation in the international game."[10] The capacity to wield power is in turn defined and circumscribed most fundamentally by the ability to exercise control over *physical territory*:

> For Realists, territorial boundaries define the area from which resources necessary for military and economic power can be extracted, thereby circumscribing the extent of state power. It is this notion of territorially defined power that underpins Arnold Wolfers' classic Realist image of states as billiard balls: opaque, hard, clearly defined spheres colliding with one another. The circumference of each sphere is defined by territory. For international lawyers, control over a defined territory is the first criterion of statehood, an indispensable prerequisite for participation in the international system.[11]

Sovereignty, in other words, is power, power is territorial control, and sovereignty is thereby the exclusive province of geographically-bounded, territorial states.

In the rather more Lockean "Liberal" view, the primary actors on the international stage are not these "opaque single units" of territorially-bounded states, but are instead "individuals and groups operating in both domestic and transnational civil society."[12] The state, in the Liberal vision, acts as the "*agent*. . . of individual and group interests;"[13] it is an institution centrally defined not by its capacity to wield unappealable, "sovereign" power over those found within its borders, but by its ability to represent the interests of a defined population and to act on their behalf. The inquiry into the sources of

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10. Anne-Marie Slaughter, *Interdisciplinary Approaches to International Economic Law: Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717, 724 (1995) [hereinafter Slaughter, *Interdisciplinary Approaches*]. *See also* Slaughter, *International Law*, *supra* note 8, at 507 (summarizing the assumptions behind the Realist view).

11. Slaughter, *Interdisciplinary Approaches*, *supra* note 10, at 723-24. *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §201 (1987) ("Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.").

12. Slaughter, *Interdisciplinary Approaches*, *supra* note 10, at 728.

13. *Id.* at 729 (emphasis added).

international order shifts from *territory* as a source of state power to the "modes and accuracy of representation of social interests."[14]

Existing states embody, to a greater or lesser extent, these competing conceptions of the sources of their own power. They can be roughly divided into Liberal states whose governance philosophy stems from the Liberal tradition and whose claim to sovereignty is derived from this explicit or implicit agency relationship to those they claim to represent, and Realist states, who cannot make this claim. The Liberal state is characterized by the presence of "some form of representative government secured by the separation of powers, constitutional guarantees of civil and political rights, juridical equality, and a functioning judicial system dedicated to the rule of law."[15] The Realist state is characterized by the absence of these features.

Perritt's predictive contention is that the rise of cyberspace does not threaten the sovereign power of Liberal and Realist states equally, but instead profoundly and perhaps permanently alters the balance of power between them.[16] The Internet, by severing once and for all the link between physical territory and politically relevant cause and effect—a link that has in any event been steadily weakening over the course of the twentieth century—may indeed herald the death of the Realist vision and the Realist state. However, "Liberal" sovereignty and the "Liberal" sovereign, whose role is to inform citizens and facilitate their collective deliberation about the nature of the public good, to

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14. *Id.* at 730-31.

15. Slaughter, *International Law, supra* note 8, at 511. *See also* Anne-Marie Burley, *Law Among The Liberal States: Liberal Internationalism and the Act of State Doctrine* 92 COLUM. L. REV. 1907, 1915 (1992) (citing four principal attributes of Liberal states: formal legal equality for all citizens and constitutional guarantees of civil and political rights such as freedom of religion and the press; broadly representative legislatures exercising supreme sovereign authority based on the consent of the electorate and constrained only by a guarantee of basic civil rights; legal protection of private property rights justified either by individual acquisition, common agreement, or social utility; and market economies controlled primarily by the forces of supply and demand) (citing Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205, 206 (1983)).

16.

> New information technologies threaten sovereigns that depend on maximum internal political, economic, and cultural control over their peoples. In societies where power is already dispersed between the government and the citizens, new information technologies do not and cannot pose a similar threat to sovereignty. For non-liberal governments, the Internet probably does seem like a unique threat to their abilities to control the politics, economics, and culture within their territories. No longer can totalitarian regimes ensure themselves a safe environment by controlling the newspapers, radio, and television stations because the World Wide Web remains beyond their control and manipulation.

Perritt, *The Internet as a Threat to Sovereignty, supra* note 3, at 431.

enforce the Rule of Law, and to provide for the collective security of its citizens, will survive and flourish in the new networked world. Because Liberal states do not rely on the link between territory and power, they can better function in a world in which that link is being destroyed. Liberal states will find ways to use the Internet to strengthen Liberal governance,[17] to do what they do better than they do it now. Realist states—those relying solely on territory and power as the source of their authority to act—will not. The Internet surely complicates statehood and statecraft, but hardly renders either irrelevant.[18]

As a predictive matter, I tend to agree with most of what Perritt says. The Internet profoundly alters the operating environment—the "selection pressures"—under which a vast array of intermediary institutions, including the state, operate.[19] I, like Perritt, believe that some will more successfully rearrange their *modus operandi* than others. The Commentator's Second Prerogative, of course, is to restate the questions being addressed so as to uncover points of disagreement, hopefully profound disagreement, with the thesis presented in the paper at hand. Taking up this mantle (not unwillingly), I would like to focus this brief essay on the normative underpinnings of both

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17. *Id.* at 424.

18. Prof. James Boyle has also suggested that our views about the Internet's effects on the exercise of state power depend critically on our initial conceptions of state power and state sovereignty, although his argument rests on very different premises than Perritt's. *See* James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hard Wired Censors* (visited Apr. 6, 1998) <http://www.wcl.american.edu/pub/faculty/boyle/foucault.htm>.

19. The Internet's destabilizing effects on existing intermediaries of all kinds, including political intermediaries, is, as Perritt has elsewhere noted, its "most revolutionary potential." Henry J. Perritt, Jr., *Internet as a Threat to Sovereignty*, <http://www.vcilp.org/~perritt>, at 9:

> [The Internet] is a technique for organizing those with shared interests. It permits members of relatively specialized diaspora to find each other anywhere in the world. The Internet threatens existing political intermediaries because it provides new channels between sources of information and ordinary members of the public.... Intermediaries in modern societies take various forms. Some, such as parliaments, are explicitly political. Some, such as stock exchanges, are private and focused exclusively on economic relationships. Some, such as newspapers and television stations, are private and focus on a combination of economic and political transactions. *The Internet threatens all of them.*

Id. at 10 (emphasis added). *See also* Symposium, *Financial Services: Security, Privacy, and Encryption*, 3 B.U. J. SCI & TECH. L. 4 (1997) (comments of Valerie McNevin) (noting the Internet's potential to disintermediate financial services); Recent Agency Action, 110 HARV. L. REV. 959 (1997). [T]he SEC appears to have agreed with a host of commentators who have concluded that "disintermediation", the elimination of middlemen, in the face of beneficial technology is inevitable." *Id.* at 964. David Post, *The Net Squeeze on the Middleman*, AM. LAW., Dec. 1996, at 39 (suggesting that the business of a wide range of intermediaries, from travel agents and publishers to lawyers, will be affected by Internet communications).

Perritt's claims specifically[20] and the Liberal theory of sovereignty and statehood more generally. I will suggest that Liberal theory itself contains a set of often unacknowledged normative premises that pose a deeper peril for the institution of statehood than Perritt suggests. These premises require us to ask not whether a world of Realist or Liberal states comports better with the new realities of the Internet, but rather how these new conditions affect our normative justifications for the existence of the state itself.

I. THE LIBERAL SOVEREIGN-AS-AGENT

Contained within the Liberal theory sketched above is something of a paradox: if the state is merely an *agent* for the interests of particular individuals and groups, in what sense can it possess truly "sovereign" power? By ordinary definition, agents are entirely subservient to and commanded by one or more principals. How, then, can any "agent" possess the supreme lawmaking power and still meaningfully be considered an agent?

Attempts to resolve this paradox of a sovereign agency, to reconcile the notion that the state is somehow both an agent of its constituent individuals and groups and a source of sovereign authority, have a long and distinguished pedigree. As Gordon Wood has shown,[21] during the immediate post-Revolutionary period in the United States leading to the drafting and ratification of the U.S. Constitution, recognition grew that a theory of sovereign agency *is* paradoxical—if not downright incoherent. Thus, the framers were required to reconceptualize radically the notion of sovereignty and, in doing so, to transform political thought entirely.[22]

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20. Perritt not only describes how existing states will respond to the new technological environment, but offers a normative justification for a particular set of responses, suggesting that the comparative advantage of Liberal states is a "cause for celebration rather than hand-wringing," and the potential triumph of a set of "underlying assumptions . . . about the nature of the state and international relations . . . that resonates with the better angels of human nature." Perritt, *The Internet as a Threat to Sovereignty*, *supra* note 3, at 425.

21. *See generally* GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969). *See also* ELKINS & MCKITRICK, *supra* note 1, at 3-13 (summarizing Wood's argument regarding the development of the "Liberal" theory of sovereignty).

22. Indeed, calling this the Radical, rather than the Liberal, theory of sovereignty might better capture its revolutionary implications. *See* WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 21, at 354 (stressing that received theories of sovereignty required the political theorists in the 1780s to "conceive of the structure of politics in a way entirely different from what any other people ever had."); ELKINS & MCKITRICK, *supra* note 1, at 10 (discussing how the Constitution "represented a master innovation in the science of politics [that] so transformed political thought as to mark a virtual terminus to the entire tradition in which their political awareness had been shaped."). *Cf.* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992).

The problem of sovereignty was "the most important theoretical question of politics" in post-Revolutionary America—the "ultimate abstract principle to which nearly all arguments were sooner or later reduced."[23] Political thought in the late seventeenth century and the eighteenth century had developed a central, even axiomatic, conviction that sovereignty was by its very nature indivisible, that in every state there must be one and only one indissoluble supreme power, one true sovereign from whom no appeal was permitted. A state with more than one independent sovereign power within its boundaries was a "violation of the unity of nature . . . like a monster with more than one head, continually at war with itself, an absurd chaotic condition that could result only in the dissolution of the state."[24]

The singular contribution of the radical Whig theorists leading up to and following the English Civil War and the "Glorious Revolution" of 1688 was to lodge this single undivided and indivisible power in the English Parliament, rejecting the Hobbesian notion that sovereign authority, being merely the "stark power to command," resided in the King alone.[25] Only in Parliament were all of the estates of the realm—King-in-Parliament, the aristocracy, and the commons—represented, and only Parliament could thus possess the full and undivided power of the English state.[26] Parliament could do no wrong, for no higher authority existed or could exist that examined its acts.

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23. WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 21, at 354.

24. *Id.* at 345-46. *See also id.* at 350 (quoting Blackstone's *Commentaries* to the effect that there must be in every form of government "a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside," and noting the "overwhelming currency" that this conception of sovereign power possessed in the pre-Revolutionary debates); ELKINS & MCKITRICK, *supra* note 1, at 11 (noting that divided sovereignty was viewed as "*imperium in imperio*, a solecism, a logical absurdity").

25. WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 21, at 348. "[T]he supreme authority of the realm, the operative sovereignty, from which there could be no appeal, lay in Parliament." ELKINS & MCKITRICK, *supra* note 1, at 11.

26. WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 21, at 347. In the 17th century the

> King increasingly came to be identified as an estate or constituent of the society along with the Commons and Peers, at last making it possible to conceive of the King in Parliament, or a mixed government, actually sharing an indivisible sovereignty. This notion that the entire society was represented in Parliament persisted into the eighteenth century and formed the foundation, although an increasingly weakening foundation, for parliamentary sovereignty.

Id. (citations omited).

The doctrine of legislative sovereignty, radical at the time, was the cornerstone of developing American political theory.[27] The events leading up to and culminating in the declaration of independence—and, ultimately, the Declaration of Independence—were entirely consistent with this doctrine. In declaring themselves no longer subject to Parliamentary command, the colonists did not disavow the principle of legislative sovereignty; they merely redirected it, declaring that the legislative sovereign possessing supreme power over the actions of the inhabitants of the New World was not Parliament but their own colonial legislatures.[28] As the crisis with Great Britain deepened, the logic of the doctrine of legislative sovereignty led to the conclusion that, precisely because sovereignty must be undivided and the legislature must be the embodiment of that sovereign power, colonial Americans were required to make a choice. They were either English subjects subject to the sovereign authority of the English Parliament in regard to *all* law, or they were not, in which case they were entirely free of all Parliamentary control.[29] They chose, of course, the latter.

This was not, however, to be the last word on the question.[30] There was yet another vision of sovereign power emerging at this time, a vision whose "intensifying claims"[31] began to assert themselves only after independence from Parliamentary control had been secured. This was the idea that the *people themselves* are sovereign, that "final and absolute lawmaking power lay not in any particular body of men but in the people-at-large"[32] who may decide "at any time, for any cause, or for no cause, but their own sovereign pleasure, to alter or annihilate both the mode and essence of any former government, and adopt

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27. *Id.* at 346-53 (noting the prevalence of the doctrine of legislative supremacy in the pre- and post-Revolutionary debates).

28. *Id.* at 352. In declaring independence from Great Britain, the "legislative authority of Parliament was disavowed, but the concept of legislative sovereignty was not"; the Americans in the 1770s "in effect accepted the irresistible logic of the concept of legislative sovereignty and turned it against the British to justify *their* legislatures' independence from all parliamentary control." *Id.* (emphasis added).

29. *Id.* at 350-52 (observing that even opponents of independence began to concede that "America must be either totally under parliamentary authority or under no parliamentary authority at all.").

30. *See* ELKINS & MCKITRICK, *supra* note 1, at 11-12. The debates of the 1760s and 1770s over what Parliament rightfully could or could not do to the colonies were "at best inconclusive on the question of sovereignty," and even with independence "the full logic of sovereignty—how it might be divided, or parceled out, or delegated, or even whether it could be—remained as indeterminate as ever." *Id.*

31. WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 21, at 363.

32. *Id.*

a new one in its stead."[33] An old idea, this, even in the 1780s, but one that had previously "always been something of a platitude, conveying little practical meaning," a "vague abstraction of politics,"[34] a "trite theory"[35] that "[i]n the normal course of things . . . lay dormant."[36] But in the immediate post-Revolutionary period political thought in the newly-independent United States began to take this trite theory most seriously, exposing its fundamental incompatibility with the received doctrine of *legislative* sovereignty: How could the people *and* the elected legislature possess sovereign power simultaneously?

Whig theory bridged the gap between the people-at-large and their legislative assemblies and reconciled these competing visions of legislative and popular sovereignty through the theory of *representation,* replacing the medieval view of Parliamentary representatives as "local men, locally minded, whose business began and ended with the interests of the constituency"[37] with the view that Parliament, individually and as a whole, represented the *whole* people:

> By the time the institutions of government were taking firm shape in the American colonies, Parliament in England had been transformed. The restrictions that had been placed upon representatives of the commons . . . fell away; members came to sit "not merely as parochial representatives, but as delegates of all the commons of the land." Symbolically incorporating

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33. *Id.* at 362.

34. *Id.* at 346.

> While some theorists well into the eighteenth century continued to speak of the ultimate sovereignty of the people, it seemed obvious that such a popular sovereignty was but a vague abstraction of politics, meaningful only . . . when the people took back all power into their hands. In the day-to-day workings of the state it was impossible for the people themselves to exert sovereign power, for the essence of sovereignty was the making of law. . . .

Id.

35. *Id.* at 362.

36. ELKINS & MCKITRICK, *supra* note 1, at 11.

> The sovereignty of the people was not in itself a new idea, having been present in Whig theory from the time of the English Civil War. But it had always been something of a platitude, conveying little practical meaning. In the normal course of things the people's sovereignty lay dormant, being exercised in full directness only in extreme instances of rebellion against tyranny.

Id.

37. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 162 (1967).

> the state, Parliament in effect had become the nation for purposes of government, and its members virtually if not actually, symbolically if not by sealed orders, spoke for all as well as for the group that had chosen them. They stood for the interest of the realm . . . "a *deliberative* assembly of *one* nation, with one interest, that of the whole . . . ."[38]

But this vision of representation was itself undermined in post-Revolutionary America, opening a serious fault line in the doctrine of legislative sovereignty.[39] During the period of the Articles of Confederation, state legislatures, seemingly so perfect a reflection of the people's will, were doing a miserable job of governing (at least in the eyes of those who called the Annapolis and later the Philadelphia Conventions for the purpose of remedying these perceived deficiencies). These failures engendered a growing sense that representation itself was the culprit, a growing sense that the "presumed mutuality of interests between representatives and people" that lay at the heart of the Whig conception[40] was itself a fiction, "'that the voice of the representatives is not alwais [sic] consonant with the voice of the people.'"[41]

If the people and the legislature were not truly *one*, the tension between legislative sovereignty and popular sovereignty was reexposed, and political theory had to go back to the drawing board.[42] As political theorists became "just as suspicious of their own elected representatives as they had ever been of royal governors, judges, and magistrates," it became clear that "there was something wrong with the idea of an unfettered assembly as a fully adequate

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38. *Id.* at 163 (quoting Edmund Burke's speech to the electors of Bristol, 1774).

39. *Id.* at 369 (describing the developing post-Revolutionary conviction that the problem of sovereignty was "at bottom a problem of representation, of the proper relationship between the [sovereign] people-at-large and their elected representatives . . .").

> [Through the r]ipening ideas about the people's relation to the government and . . . their implications for the traditional concept of representation . . . the Americans of the 1780's most directly confronted the orthodox doctrine of legislative sovereignty, eventually making sensible their intensifying claims that such final and absolute lawmaking power lay not in any particular body of men but in the people-at-large.

Id. at 363.

40. *Id.* at 387.

41. *Id.* at 365 (quoting Thomas Jefferson).

42. Opening this "gap between the people-at-large and their representatives . . . had momentous implications for Whig political thought." *Id.* at 364. "[B]y expressing as much fear and suspicion of their elected representatives as of their senators and governors, the Americans were fundamentally unsettling the traditional understanding of how the people in a republic were to participate in the government." *Id.* at 383.

reflector of the people's will . . . . "[43] The mind of the sovereign people was "having its second thoughts about the allocation it had made of sovereignty's instruments."[44]

A new view crystallized in the face of the question with which post-Revolutionary politics became preoccupied: namely, whether legislators could ever be bound by direct instructions from the people.[45] Here was the central dilemma, starkly posed: either the legislature is sovereign and the people are subject to *its* commands, or the people are sovereign and the legislature is subject to *theirs*. To those who continued to adhere to the doctrine of legislative sovereignty, the notion of truly binding instructions was a logical impossibility. By definition there could be no higher power capable of binding the sovereign itself, no "pretended power paramount to the legislature."[46] To this faction, the logical implications of the opposing view that the legislators were "nothing more than agents, deputies, or trustees" for the people—implications that included the notion that the acts of the state are not binding *law*, obligations to which the people *must* comply[47]—were too horrible to contemplate.

But it was this latter view, that the legislator was merely a limited agent or spokesman for the interests of his constituents, bound by instructions from the people precisely as an agent is bound by the instructions of the principal and,

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43. ELKINS & MCKITRICK, *supra* note 1, at 12.

44. *Id.*

45. "The search for . . . a way to control and restrict the elected representatives in their power dominated the politics and constitutionalism of the Confederation period." WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 21, at 376.

46. *Id.* at 381 (quoting Noah Webster, *Government*, AM. MAG., 1787-88, at 209). *See also id.* at 379-82 (focusing on the example of the prominent anti-Federalist Noah Webster).

> All of Webster's attacks on the right of instructions, on unalterable constitutions, and on special constitutional conventions, were eventually grounded on his conviction, the basic conviction of orthodox eighteenth-century political science, that "*the Legislature has all the power, of all the people,* " and that there could be in no state "a pretended power paramount to the legislature." . . . The principle of sovereignty required that if the legislature had an "unlimited power to do *right*" for the state, then it must also have "an unlimited power to do *wrong*."

Id. at 381-82.

47. *Id.* at 371. It follows from the logic of the view that the people were inadequately and incompletely represented in their legislative assemblies that "no law enacted by the legislatures could be considered fully binding." *Id.* at 384.

therefore, not "sovereign", that would eventually predominate.[48] In the end, there could be no middle ground, and existing conceptions of legislative sovereignty would have to yield; the people "could never be fully embodied in their houses of representatives; sovereignty and the ultimate power to make law . . . remained with the collective people."[49]

> If the Americans in the 1780's were forced to choose between their legislatures and the people-at-large as the repository of this sovereignty, just as they had been forced in the early seventies to choose between Parliament and their [own] legislatures, there could be . . . no doubt then where they would place the final supreme power. . . . Rather than disavow the powerful conception of sovereignty when confronted with it, many now, as earlier, chose to relocate it. If sovereignty had to reside somewhere in the state—and the best political science of the eighteenth century said it did—then many Americans concluded that it must reside only in the

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48. *Id.* at 371. Acceptance of the binding nature of popular instruction "ate away the independent authority of the representative and distorted, even destroyed, the traditional character of representation." *Id.* at 387. This view, in turn, brought with it the problem of legislative "factions" that so concerned Madison, for such factions are inexplicable in a world in which legislators are each representatives of the whole people. THE FEDERALIST NO. 10 (James Madison).

49. WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 21, at 387. This view was embodied most notably in the recognition that the acts of the Constitutional Convention itself were not, *and could not be*, "ordinary" legislative acts (a concept that was itself entirely oxymoronic in pre-Constitutional political thought, in which legislative acts were necessarily supreme and inviolate), but could only have force and effect when submitted to and ratified by the people-at-large:

> Madison saw clearly that the new national government . . . must obtain "not merely the assent of the Legislatures, but the ratification of the people themselves." Only "a higher sanction than the Legislative authority" could render the laws of the federal government "paramount to the acts of its members." . . . By appealing over the heads of the states directly to the people, who were the "supreme authority, the federal compact may be altered by a *majority of them*; in like manner as the Constitution of a particular State may be altered by a majority of the people of the State." As Madison put it, "the people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased.

Id. at 532-33.

> The Constitution was in fact a reassertion of the first principles of Whiggism. The Declaration of Independence had expressed "the inherent and unalienable right of the people" to form whatever kind of government they wanted. "This is the broad basis on which our independence was placed. On the same certain and solid foundation this system is erected."

Id. at 535.

> people-at-large. The legislatures could never be sovereign; no set of men, representatives or not, could "set themselves up against the general voice of the people."[50]

If the people were indeed sovereign, then sovereignty was (and is) in a very real sense entirely *extra-governmental*:

> Sovereignty resides not in rulers or magistrates, nor in state governments, nor indeed in governments of any kind, but in the whole body of the people, who can never allow it to be taken anywhere else. And such is the supreme authority of the people that although the people may not, indeed cannot, part with any portion of that sovereignty—which is to say that sovereignty is in some final sense indivisible after all— they may still distribute its functions in as many ways as they choose, and yet again revoke them should prudence so advise it.[51]

In the Constitutional scheme of things, the people no longer actually shared in a part of the government (as, for example, the people of England participated in their government through the House of Commons), but they "remained outside the entire government, watching, controlling, pulling the strings for all their agents in every [governmental] branch."[52] The power of the people outside of the government was "absolute and untrammeled; that of their various delegates in the government could never be."[53]

Relocating the locus of sovereign power from the legislative bodies to the people outside of *all* governmental institutions represented "far more than

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50. *Id.* at 382.

51. ELKINS & MCKITRICK, *supra* note 1, at 12. Thus, what appears to be a division of sovereignty in the American Constitution—the co-existence of multiple "sovereigns" within the federal system—is not inconsistent with the idea that sovereignty is necessarily indivisible, because the federal system does not divide sovereignty at all; it remains at all times with the individual constituents of society, who may, if they choose—for it is within their sovereign power to choose—grant portions of that power to particular institutions.

52. WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 21, at 388.

53. *Id.* at 389.

simply an intellectual shift of a political conception."[54] This relocation was not merely a radical redistribution of the powers of society within the government, but a "total destruction of these powers and a shattering of the categories of government that had dominated Western thinking for centuries."[55] Using the "trite theory of popular sovereignty" as a blueprint for the actual exercise of governmental power they gave this theory, for the first time, a practical, working implementation and, in so doing, achieved what the "European radicals with all their talk of all power in the people had scarcely considered imaginable."[56]

II. LIBERAL SOVEREIGNTY AND THE LIBERAL STATE

Thus the paradox of the "sovereign agent" was resolved. The state, at least as conceived within the developing Liberal theory of state as agent, is *not* sovereign at all. The state's power is entirely derivative—the very opposite of "sovereign"—derived ultimately from the "consent of the governed"[57] who, possessing sovereign but delegable power, constitute the state as their agent, enabling them to engage in collective action conducive to their pursuit of happiness.

The paradox is with us still. A normative view of states as constituted agents whose power derives from the people's collective will and their ultimately indivisible sovereignty leaves open the possibility that the creation of states does not exhaust the available "constitutional" possibilities. States do not and indeed cannot possess *exclusive* power to represent that collective will; state power, viewed through the lens of these normative underpinnings of the Liberal theory, cannot simply be assumed or taken for granted, for whatever power the state possesses is necessarily a derivative power.

A normative Liberal theory of *sovereignty,* in other words, does not ineluctably lead us to the Liberal *state.* It implies, rather, that the people have untrammeled power—sovereign, unappealable power—to constitute different agents of their own choosing for different purposes and different circumstances.

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54. *Id.* at 383.

55. *Id.* at 385.

56. *Id.* at 362.

57. This phrase, of course, is from the second paragraph of the Declaration of Independence; its derivation from Lockean notions of social contract, and other Whig and American writings (in particular the writings of James Wilson and George Mason), has been exhaustively documented elsewhere. *See generally* CARL BECKER, THE DECLARATION OF INDEPENDENCE (1922); GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 248-255 (1978); PAULINE MAIER, AMERICAN SCRIPTURE 128-140 (1997).

Because there are, in any society, any number of competing intermediating institutions that can serve this agency function—religious groups, corporations, voluntary associations of all kinds—the theory itself would appear to demand consideration of the extent to which some portion of the people's sovereign power has been reposed with these, or other, institutions. It requires that we ask the following questions: (1) Whether the *state* (as opposed to these alternative agents of collective action) is the institution best able to serve the agency role contemplated by the theory of Liberal sovereignty for a given population? and, (2) How we might recognize alternative delegations of "sovereignty" away from the state and toward these alternative institutional arrangements?

The normative view that the state is a tool through which individuals and groups order their social universe raises questions that cannot be answered by a comparison of Liberal and Realist states, any more than an individual or group can answer the question of whether they need an automobile to get from Point A to point B by comparing Fords and Toyotas. If Liberal theory is truly to strip states of their Realist territorial underpinnings, it must return to the source of the power to govern—the consent of the sovereign to exercise that power—and ask where, in any given context, that power has been placed. Before we applaud the coming dominance of the Liberal state, or conclude that Liberal states are the preferred source of law governing Internet interactions—that the "Rule of Law" applied to, say, Usenet newsgroups or the transactions at a web server, is to be *state* generated, or that international cooperation among *states* will be a source of just governance—we need to examine more thoroughly the competing claims of state and non-state institutions alike to represent the sovereign's delegated powers. Liberal theory, properly construed, does not merely give non-governmental organizations (NGOs) a place at a negotiating table whose shape and agenda is defined by existing state actors;[58] it places NGOs of all kinds and states on equal footing and asks, as a threshold matter: To which institution(s) has the "sovereign" delegated its power? It cannot content itself with questions such as what countries should have jurisdiction in "protecting consumers from [Internet] fraud,"[59] or what are the characteristics of those groups that should have input into the states' treaty deliberations. It must ask whether exercises of power are legitimized by the consent of the sovereign individuals participating in these

58. Perritt, *The Internet as a Threat to Sovereignty, supra* note 3, at 439.
59. *Id.* at 428.

transactions, and whether and in what circumstances state treaty obligations constitute valid expressions of the sovereign's will.[60]

This will undoubtedly require a new vocabulary and analytic framework for the study of consent itself, one that may help resolve some of Liberal theory's more persistent and perplexing theoretical problems. Lea Brilmayer has persuasively argued that deriving *state* power from the consent of the governed, so fundamental to Liberal theory,[61] is subject to a serious and perhaps insurmountable theoretical objection:[62] consent to the exercise of power by a territorial state (of the kind that we "normally take for granted"[63]) pre-supposes a prior assignment of territorial sovereignty, and therefore cannot logically justify the actions of the territorial sovereign.[64] Individuals cannot logically be deemed to have consented, expressly or implicitly, to the exercise of a state's power over them without "presum[ing] the existence of a legitimate state that can bargain with an individual and obtain his or her consent," thereby begging the question of how to legitimize the exercise of that power.[65]

> [I]n the absence of any prior assumption of the state's legitimate power, the state cannot rely on territorial sovereignty to justify its power over people. Some prior assignment of territorial power is necessary to establish power over people under a consent theory, but how can this initial

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60. Although Prof. Slaughter recognizes that the liberal model of international relations "will present international lawyers with a new set of normative challenges" and will require that we "redefine existing principles of international law and develop new principles to govern actors and processes" and reconceptualize "[t]he *Grundnorm* of sovereignty," she suggests that the "norm of sovereignty will have to be constructed *so as to constitute and protect the political institutions of liberal states* in carrying out their individual functions and in checking and balancing one another." Slaughter, *Interdisciplinary Approaches, supra* note 10, at 534-36 (emphasis added). My suggestion is that the norm of sovereignty at the foundation of the liberal theory will not necessarily "constitute and protect the political institutions of liberal states."

61. Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 10 (1989).

> [C]onsent has been thought by many political philosophers to be an important element of the state's legitimate power over its own people within its own territory. The Western Liberal democratic tradition, in particular, regards the voluntary assumption of citizenship responsibilities as the best explanation of the state's right to rule. Since Locke, many theorists have attempted to explain government authority in terms of such consent, whether express or tacit.

Id.

62. *Id.* at 13. Brilmayer terms this the "bootstrapping objection." *Id.*

63. *Id.* at 14.

64. *Id.* at 1-17. The legitimacy of territorial nation-states "cannot be established without a prior showing of territorial sovereignty . . . [but] consent does not establish territorial sovereignty." *Id.* at 17.

65. *Id.* at 13-14.

> assignment itself be justified? [M]ost consent arguments presume the very state power that they attempt to justify.... How can the state ever come into being through consent when it must already possess power before consent can be established?[66]

As Brilmayer herself points out, the bootstrapping objection arises from the need to find the consensual underpinnings of the *territorial* state; it is not inherent in all consent-based theories, and it is inapplicable when contemplating the creation of governmental entities that lack territorial status.[67] What Brilmayer calls true "social contract" theories[68]—of which Robert Nozick's is perhaps the best-known recent example[69]—can avoid the bootstrapping objection because they rely not on the relationship between individuals and a theoretical entity whose legitimate existence has not yet been justified, but rely instead on the relationship between equal individuals, each of whom "agrees to respect the [authority of the governing entity] that is about to be created as long as the others do."[70]

We have, perhaps, never before been able to take seriously the possibility that individuals in the ordinary course of their affairs had it within their power to create such "governmental entities that lack territorial status,"[71] a-territorial consensual associations with no geographical referents whatsoever on which a portion of the "sovereignty" of those individuals devolve. In a world of physical cause and physical effect, it is entirely natural that physical proximity and

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66. *Id.* at 12. Consent to a territorial sovereign's exercise of power "requires a prior division into territorially sovereign states" that cannot itself be justified within a consent-based framework. *Id.* at 13.

67. *Id.* at 16.

> These bootstrapping objections to contractarian formation of a government do not necessarily arise when parties create governmental entities that lack territorial status. One might, for instance, agree with another individual that in the event of a dispute both will submit to binding arbitration. Although the arbitrator's authority is established by consent, its authority is not territorial. In such cases, only the actual participants are bound; the extent of authority is not defined territorially.

Id.

68. *Id.* at 10-11 (defining a "consent theory" as one in which the state's power is explained simply by the individual's consent to an existing state's authority, and a "contract theory" as one in which state power can be explained as a social contract to form a state in the first instance).

69. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974). *See* Brilmayer, *supra* note 61, at 13-16 (discussing Nozick's contract-based theory of the state).

70. Brilmayer, *supra* note 61, at 13.

71. *Id.* at 16.

geographical clustering become the central axes along which lawmaking collectives are "naturally" grouped. But not so in cyberspace, where the natural rules of physical clustering no longer apply[72] and where, as a consequence, the underlying a-territorial logic of consent-based theories can finally be given its full due. This is accomplished through decentralized and a-geographical lawmaking groups that do not impose order on the electronic world but through which order can emerge. Some of these decentralized processes will look familiar to us as a kind of "electronic federalism."[73] According to this model, individual network access providers, rather than territorially-based states, become the essential units of governance; users in effect delegate the task of rule-making to them, thus conferring a portion of their sovereignty on them, and choose among them according to their own individual views of the constituent elements of an ordered society. The "law of the Internet" thus emerges, not from the decision of some higher authority, but as the aggregate of the choices made by individual system operators about what rules to impose, and by individual users about which online communities to join.[74]

In the context of questions of Internet governance, the implications of taking seriously the consensual underpinnings of sovereign power that form the normative base of Liberal theory may be surprising. Consider, by way of illustration, the question of the proper jurisdictional scope of a state's power to impose its law "extraterritorially", to activities occurring outside of its territorial boundaries, a question that courts, legislators, and commentators alike increasingly confront in an interconnected world.[75] A state's "jurisdiction

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> [T]he effects of online activities [are not] tied to geographically proximate locations. Information available on the World Wide Web is available simultaneously to anyone with a connection to the global network. The notion that the effects of an activity taking place on that Web site radiate from a physical location over a geographic map in concentric circles of decreasing intensity, however sensible that may be in the nonvirtual world, is incoherent when applied to Cyberspace. A Web site physically located in Brazil . . . has no more of an effect on individuals in Brazil than does a Web site physically located in Belgium or Belize that is accessible in Brazil.

Johnson & Post, *Law and Borders*, *supra* note 2, at 1375.

73. *See* Joel Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, *in* BORDERS IN CYBERSPACE 84 (B. Kahin & C. Nesson eds., 1996) (discussing "network federalism"). *See also* Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095 (1996).

74. Post, *Governing Cyberspace*, *supra* note 3, at 164.

75. There is no shortage of writing about the novel jurisdictional issues posed by Internet transactions. Richard Acker, *Choice-of-Law Questions in Cyberfraud*, U. CHI. LEGAL F. 437 (1996). *See, e.g.*, Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 510-19 (1996); Dan Burk, *Patents in Cyberspace: Territoriality and Infringement on Global Computer Networks*, 68 TUL. L. REV. 1 (1993); Matthew R. Burnstein, *Conflicts on the Net: Choice of Law in Transnational*

to prescribe" law in regard to events taking place beyond its borders is difficult to justify normatively within the Realist framework;[76] if states are "opaque billiard balls" operating in a world of strictly bounded national territories, the legitimate exercise of state power stops at state borders. To the Realist, all law is necessarily and inherently subject to a "presumption of territoriality", enshrined in Justice Holmes' famous dictum in *American Banana Co. v. United Fruit Co.*: "All legislation is *prima facie* territorial."[77] Because the "general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done,"[78] federal statutes should presumptively be construed "to be confined in [their] operation and effect to the territorial limits over which the lawmaker has general and legitimate power."[79]

This presumption of territoriality, of course, "makes no sense"[80] viewed from the Liberal perspective, a perspective from which the two bogeymen of the Realist view, territoriality and power, have been banished. Interests, not physical territory, are the focus of the Liberal inquiry into the extent of a state's lawmaking power, and Liberal critics often point to encouraging signs that courts have become increasingly receptive to flexible, territory-independent doctrines for analyzing extraterritorial action. They point, for example, to the emergence of an "effects test" under which, in Judge Learned Hand's early formulation, a state's extraterritorial lawmaking power can be imposed on

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Cyberspace, 29 VAND. J. TRANSNAT'L L. 75 (1996); William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197 (1995); Alexander Gigante, *Ice Patch on the Information Superhighway: Foreign Liability for Domestically Created Content*, 14 CARDOZO ARTS & ENT. L.J. 523 (1996); Jane C. Ginsburg, *Copyright Without Borders? Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace*, 15 CARDOZO ARTS & ENT. L.J. 153 (1997); David Nimmer, *Brains and Other Paraphernalia of the Digital Age*, 10 HARV. J.L. TECH. 1 (1996); Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1 (1996).

76. *See* Slaughter, *Interdisciplinary Approaches, supra* note 10, at 731-35.

77. American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909).

78. *Id.* at 356.

79. *Id.* at 357. For general discussions of the development of the territorial presumption, see Bradley, *supra* note 75, at 510-9; GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 54-615 (3d ed. 1996).

80. Slaughter, *Interdisciplinary Approaches, supra* note 10, at 736. *See also* Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 184 (suggesting that "the world in which a presumption against extraterritoriality made sense is gone").

conduct that was intended to and did have an "effect on U.S. commerce."[81] They also point to the two-pronged "rule of reason" adopted in the Third Restatement of American Foreign Relations Law, under which a state may prescribe law in regard to extraterritorial conduct that has or is intended to have a "substantial effect" with the state's territory or is "directed against" certain state interests,[82] as long as its exercise of such jurisdiction is not "unreasonable."[83]

These more flexible doctrines clearly loosen the Realist grip on international lawmaking and politics, and appear to comport better with Liberal understandings of the nature and sources of state power. Professor Slaughter has gone so far as to suggest that the application of Liberal theory to questions of extraterritoriality is likely to result in something "closer to a presumption of extraterritoriality than a presumption of territoriality."[84]

But here is the final paradox. The presumption of *extra*territoriality is not necessarily the opposite of the presumption of territoriality; that the latter is a logical outgrowth of Realist theory (which it is) does not necessarily imply that the former is a logical outgrowth of Liberal theory (which it is not). If, as I have suggested, Liberal theory makes the consent of the sovereign the ultimate source of the legitimate exercise of power, one could argue that extraterritorial application of law does even *more* damage to the Liberal vision than does the

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81. United States v. Alcoa, 148 F.2d 416, 443-44 (2d Cir. 1945).

82. RESTATEMENT (THIRD) OF AMERICAN FOREIGN RELATIONS LAW OF THE UNITED STATES, §402 (1987).

> [A] state's "jurisdiction to prescribe" can be exercised in respect to (1)(a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory; (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Id. See also id. §402 cmt. d. "This Restatement takes the position that a state may exercise jurisdiction based on effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable under § 403," and describes this effects principle as "not controversial with respect to acts such as shooting or even sending libelous publications across a boundary" and "generally accepted with respect to liability for injury in the state from products made outside the state and introduced into its stream of commerce." *Id.*

83. *Id.* § 403(1). Even when one of the §402 bases of jurisdiction is present, a state "may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." *Id.*

84. Slaughter, *Interdisciplinary Approaches, supra* note 10, at 741.

presumption of territoriality.[85] However difficult it may be to argue that individuals or groups have consented to the application of a territorial state's exercise of power over them, it is far more difficult to make that argument in the context of the exercise of state *power against those who have no part in constituting the state's authority.*[86]

The 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 consented to its application. If that network is itself bounded or defined by physical geography, the presumption of territorial reach and the power of the territorial agent is well founded; if not, not.

This is a remarkably apt presumption, one might add, for an a-geographical networked world, one that has always been at the heart of the fundamentally a-territorial Liberal vision and one that will better suit a world where territorial boundaries are difficult to perceive and largely irrelevant.

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85. In this regard, it is perhaps interesting that the notion of consent does not appear to animate the Restatement's view of the legitimacy of exercising extraterritorial jurisdiction. *See id.* §403(2) (listing "all relevant factors" to be evaluated to determine the reasonableness of a state's exercise of jurisdiction without mention of the consent of the person or entity over whom the jurisdiction is exercised).

86. Prof. Mark Gibney has forcefully made this point:

> The most remarkable aspect of extraterritoriality—oftentimes lost in the futile effort to uncover Congressional intent—is that it represents such a vastly different conception of the law than what exists under the norms and principles of democratic rule. In this country, for example, the creation and application of the law has as its very basis the notion of the consent of the governed. That is, those who create and pass the laws are ultimately held accountable to "the people." This, however, is not the situation in the extraterritorial context. Extraterritoriality is essentially a situation where rulemakers in one country get to pick and choose which of their own rules they will apply in other countries. Under this scheme, the lawmakers in the country promulgating laws that will be enforced in other countries are not accountable to "the people" in these other lands. These "other people" are not consulted about the application of foreign law to them, nor do they have the ready means to change the law if it is not consistent with their own domestic standards and norms.

Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Individual Roles, and the Imperative of Establishing Normative Principles,* 19 B.C. INT'L & COMP. L. REV. 297, 305-06 (1996).

CONCLUSION

> *[D]uring the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man. . . . [T]here are many places where they live so now. For the savage people in many places of America . . . have no government at all, and live at this day in the brutish manner . . . [From this] it may be perceived what manner of life there would be, where there were no common Power to feare . . . .*[87]

Settlement of the new territory of the New World led ultimately to new questions about, and a remarkable new view of, the nature of sovereign power. Settlement of a-territorial cyberspace will likely have much the same effect. The promise of the Liberal theory is that is can indeed relegate notions of physical territory and power to marginal positions, thereby accommodating questions regarding the governance of the new, a-geographical world of electronic networks and electronic links between geographically dispersed polities. Realization of that promise will require that we think deeply—far more deeply than I have here—about the implications of the "trite theory" of popular sovereignty once again.

87. THOMAS HOBBES, LEVIATHAN 103, 105 (1950).