

Jack L. Goldsmith, *Against Cyberanarchy*

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Consider the predicament of one of the scores of companies that offer, sell, and deliver products on the World Wide Web. Assume that the web page of a fictional Seattle-based company, Digitalbook.com, offers digital books for sale and delivery over the Web. One book it offers for sale is *Lady Chatterley's Lover*. This offer extends to, and can be accepted by, computer users in every country with access to the Web. Assume that in Singapore the sale and distribution of pornography is criminal, and that Singapore deems *Lady Chatterley's Lover* to be pornographic. Assume further that Digitalbook.com's terms of sale contain a term that violates English consumer protection laws, and that the publication of Digitalbook.com's *Lady Chatterley's Lover* in England would infringe upon the rights of the novel's English copyright owner. Digitalbook.com sells and sends copies of *Lady Chatterley's Lover* to two people whose addresses (say, anonymous@aol.com and anonymous@msn.com) do not reveal their physical location but who, unbeknownst to Digitalbook.com, live and receive the book in Singapore and London, respectively.

The skeptics claim that it is difficult for courts in Singapore or England to regulate disputes involving these transactions in accordance with geographical choice-of-law rules. In addition, they argue that English and Singaporean regulations will expose Digitalbook.com to potentially inconsistent obligations. Finally, the skeptics claim that Digitalbook.com can easily evade the Singaporean and English regulations by sending unstoppable digital information into these countries from a locale beyond their enforcement jurisdiction.

On the normative side, the skeptics are concerned that the application of English and Singaporean law to regulate Digitalbook.com's transactions constitutes an impermissible extraterritorial regulation of a U.S. corporation. Because Digitalbook.com might bow to the English and Singaporean regulations, and because the company cannot limit its cyberspace information flows by geography, the English and Singaporean regulations might cause it to withdraw *Lady Chatterley's Lover* everywhere or to raise its price. The English and Singaporean regulations would thus affect Digitalbook.com's behavior in the United States and adversely affect the purchasing opportunities of parties in other countries. The skeptics believe these negative spillover effects of the national regulations are illegitimate. They also think it is unfair for England and Singapore to apply their laws in this situation because Digitalbook.com had no way of knowing that it sold and delivered a book to consumers in these countries. * * *

The skeptics are in the grip of a nineteenth century territorialist conception of how "real space" is regulated and how "real-space" conflicts of law are resolved. This conception was repudiated in the middle of this century. The skeptics' first mistake, therefore, is to measure the feasibility and legitimacy of national regulation of cyberspace against a repudiated

yardstick. * * * Changes in transportation, communication, and in the scope of corporate activity led to an unprecedented increase in multijurisdictional activity. These changes put pressure on the rigid territorialist conception, which purported to identify a single legitimate governing law for transborder activity based on discrete territorial contacts. So too did the rise of the regulatory state, which led to more caustic public policy differences among jurisdictions, and which pressured the interested forum to apply local regulations whenever possible. * * *

Today, the Constitution permits a state to apply its law if it has a "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Insurance Co v. Hague*, 449 U.S. 302, 312-13 (1981)). In practice, this standard is notoriously easy to satisfy. It prohibits the application of local law only when the forum state has no interest in the case because the substance of the lawsuit has no relationship to the state. Customary international law limits on a nation's regulation of extraterritorial events are less clear because there are few international decisions on point, and because state practice does not reveal a settled custom. Nonetheless, it seems clear that customary international law, like the United States Constitution, permits a nation to apply its law to extraterritorial behavior with substantial local effects. In addition, both the Constitution and international law permit a nation or state to regulate the extraterritorial conduct of a citizen or domiciliary. In short, in modern times a transaction can legitimately be regulated by the jurisdiction where the transaction occurs, the jurisdictions where significant effects of the transaction are felt, and the jurisdictions where the parties burdened by the regulation are from. * * *

A nation can purport to regulate activity that takes place anywhere. The Island of Tobago can enact a law that purports to bind the rights of the whole world. But the effective scope of this law depends on Tobago's ability to enforce it. And in general a nation can only enforce its laws against: (i) persons with a presence or assets in the nation's territory; (ii) persons over whom the nation can obtain personal jurisdiction and enforce a default judgment against abroad; or (iii) persons whom the nation can successfully extradite.

A defendant's physical presence or assets within the territory remains the primary basis for a nation or state to enforce its laws. The large majority of persons who transact in cyberspace have no presence or assets in the jurisdictions that wish to regulate their information flows in cyberspace. Such regulations are thus likely to apply primarily to Internet service providers and Internet users with a physical presence in the regulating jurisdiction. Cyberspace users in other territorial jurisdictions will indirectly feel the effect of the regulations to the extent that they are dependent on service or content providers with a presence in the regulating jurisdiction. But for almost all users, there will be no threat of

extraterritorial legal liability because of a lack of presence in the regulating jurisdictions. * * *

[T]he * * * choice-of-law problems implicated by cyberspace are * * * no more complex than the same issues in real space. They also are no more complex or challenging than similar issues presented by increasingly prevalent real-space events such as airplane crashes, mass torts, multistate insurance coverage, or multinational commercial transactions, all of which form the bread and butter of modern conflict of laws. Indeed, they are no more complex than a simple products liability suit arising from a two-car accident among residents of the same state, which can implicate the laws of several states, including the place of the accident, the states where the car and tire manufacturers are headquartered, the states where the car and tires were manufactured, and the state where the car was purchased. Resolution of choice-of-law problems in these contexts is challenging. But the skeptics overstate the challenge.

David G. Post, *Against "Against Cyberanarchy"*

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Goldsmith's position—what I term "Unexceptionalism"—is straightforward. However difficult and complicated Digitalbooks.com's problems may be, they are no *more* difficult or complicated because the underlying transactions take place "in cyberspace." * * * Those who think otherwise—Goldsmith calls them "regulation skeptics," though I prefer the less loaded and more symmetrical term "Exceptionalists"—believe that cyberspace *is* somehow different, that it matters, for purposes of understanding these jurisdictional questions, that Digitalbooks.com is operating on the World Wide Web and not in a brick-and-mortar realspace storefront. * * *

[At the core of the Unexceptionalist position is] a simple, but very powerful, syllogism:

Transnational activities of an ordinary, brick-and-mortar bookstore—"Analogbooks, Inc."—are subject to "settled principles" of "customary international law."

These settled principles hold that if Analogbooks' realspace activities produce "substantial local effects" in Singapore, or in England, those activities can "legitimately be regulated" by those governments.

Digitalbooks' activities are "functionally identical" to Analogbooks' activities.

Therefore, if Digitalbooks' cyberspace activities produce "substantial local effects" in Singapore, or in England, those activities can "legitimately be regulated" by those governments. The logic is unassailable: If X is true in environment 1, and if environment 2 is "functionally identical" to

environment 1, then X is true in environment 2. The argument, however, is not quite as persuasive as it might appear at first glance.

Take, for instance, the Unexceptionalists' reliance upon settled principles of customary international law. Even accepting Professor Goldsmith's assertion that these principles "are settled"—in particular, the "uncontested assumptions" that, at least in modern times, transactions "can legitimately be regulated by . . . the jurisdictions where significant effects of the transaction are felt," and that "a nation's right to control events within its territory and to protect its citizens permits it to regulate the local effects of extraterritorial acts"—it is clear that this "modern view" of international jurisdiction is itself the product of profound changes in the world over the past century or so (as Goldsmith himself points out).

These now-settled principles were, in other words, once themselves in conflict with then-settled principles. It was once "settled" law that a state *cannot* regulate extraterritorial acts, the "substantial local effects" of those acts notwithstanding, and that therefore Analogbooks' activities could not "legitimately be regulated" in either Singapore or England. The Unexceptionalists of one hundred, or even fifty, years ago might have made an argument very much like Goldsmith's, arguing that rail transport, the telephone, or radio broadcasting, would (and should) have no effect on our analysis of jurisdictional problems. We can imagine the following colloquy:

Scene: A New York street corner, circa 1900. Two law professors, Professor E and Professor U, meet.

Professor E: "Have you noticed? This telegraph thing changes everything! I can step inside a Western Union office in New York and execute a contract in San Francisco *instantaneously!* Incredible, eh?"

Professor U: "Well, I suppose it is. But what of it?"

E: "What of it? Surely you jest. The world as we know it will never be the same. We're going to need new principles of law to deal with this phenomenon. Our jurisdictional principles—especially that one that requires *physical presence* for the exercise of "jurisdiction to prescribe"—must yield to this new context, no?"

U: "Not at all. Transactions completed by telegraph are functionally identical to those completed by mail or by smoke signal; they all involve real people in one territorial jurisdiction either (i) transacting with real people in other territorial jurisdictions or (ii) engaging in activity in one jurisdiction that causes real-world effects in another territorial jurisdiction. It is settled law that the people of California *cannot* reach people and transactions occurring outside of its borders. Why would we need to adjust those principles now?"

*** Looking backwards, of course, we know that events proved *those* Unexceptionalists wrong. Though it was surely difficult to see at the time, the world was changing profoundly, and settled understandings were becoming unsettled because of that change. ***

The world, sometimes, does that—changes profoundly. When it does, settled understandings sometimes change with it. Unless we think that for some reason this cannot happen again, questions about the legitimate scope of a nation's jurisdictional reach cannot rest on the notion that those questions are somehow already, and forever, "settled."

That the world *can* change so as to unsettle settled principles does not, of course, mean that it has done so in ways that are relevant to the questions at hand. The Unexceptionalists say that it has not; activity in cyberspace is "*functionally identical to transnational activity mediated by other means, such as mail or telephone or smoke signal.*"

What could that possibly mean? It does not take a great deal of insight or deep thinking to come up with ways in which activity in cyberspace is functionally not identical to activity in realspace. For example, in cyberspace, I can communicate an offer to sell some product or service

- instantaneously (or nearly so);
- at zero marginal cost (or nearly so);
- to several million people;
- with near-zero probability of error in the reproduction or distribution of that offer;
- which can be stored, retrieved, and translated into another language, by each of the recipients (instantaneously, and at zero marginal cost); and
- to recipients who have the capability to respond to my offer (instantaneously, and at zero marginal cost).

I surely cannot engage in a transaction having *all* of those features simultaneously using mail, or telephones, or smoke signals. * * *

It is true that events and transactions in realspace and cyberspace are identical in many ways, and can be treated identically for many purposes. Transactions between human beings are still transactions between human beings, whether they take place via e-mail, postcards, telegraph, or smoke signal. Whatever it is that motivates human beings to engage in one transaction or another—love, hate, greed, curiosity, fear, etc.—remains the same, on or off the Internet. * * *

Digitalbooks.com and Analogbooks will thus have many identical characteristics. Digitalbooks.com, just like Analogbooks, provides: a forum where buyers and sellers can exchange consideration for goods; a system for making sure that those goods get shipped from seller to buyer after a transaction is consummated; rules for identifying the winners and losers of individual auctions; and means for obtaining payment for its services, accounting for those payments, and transferring money to its suppliers. * * *

However, it is also true that events and transactions in realspace and cyberspace are *not* identical in many other ways. For example, transactions in cyberspace can take place at much greater physical remove; they are

consummated by means of the movement of bits rather than atoms; they are digitally encoded; they are unaffected by the participants' sense of smell; they are embedded in and mediated by software; they travel at the speed of light, etc. * * *

The question we need to be addressing, then, is this one: are Digitalbooks.com's and Analogbooks' transactions identical—or, at least, sufficiently similar—to one another *with respect to the relevant principles of international choice of law and prescriptive jurisdiction*? If so, it is reasonable to ignore the many differences between them; if not, it is not.

To the Unexceptionalist, Digitalbooks.com's and Analogbooks' transactions *are* identical with respect to the relevant principles of international choice of law. The issues raised by application of these principles and prescriptive jurisdiction to Digitalbooks.com's cyberspace transactions, they say,

... are no more complex than the same issues in real space. They also are no more complex or challenging than similar issues presented by increasingly prevalent real-space events such as airplane crashes, mass torts, multistate insurance coverage, or multinational commercial transactions, all of which form the bread and butter of modern conflict of laws. Indeed, they are no more complex than a simple products liability suit arising from a two-car accident among residents of the same state, which can implicate the laws of several states, including the place of the accident, the states where the car and tire manufacturers are headquartered, the states where the car and tires were manufactured, and the state where the car was purchased.

Goldsmith, *Against Cyberanarchy*, *supra*, at 1234.

This may well be true. Digitalbooks.com's sale of an individual book to a customer in Singapore, in isolation, is no more "complex or challenging" as a matter of international law than Analogbooks' sale of the same book to the same customer.

To stop the analysis there, however, is to miss the forest for the trees. Scale matters; the biologists and the engineers know this. * * * A tree is one thing; the forest, though it is nothing more than a large number of trees, is another, more "complex and challenging," phenomenon. The movement of a single clump of dirt down a slope is one thing; an avalanche, though it is nothing more than the movement of a lot of individual pieces of dirt down a slope, is another, more "complex and challenging," event. * * *

Therefore, although Digitalbooks.com and Analogbooks each may be doing the "same" things, the *systems* within which they operate are not necessarily the same as a consequence of that identity. *Scale matters*. Differences in degree sometimes become differences in kind; quantitative changes can become qualitative changes. Rules and principles that may be quite reasonable at one scale may be incoherent and unreasonable at another. * * *

We live in a world of inter-connected and geographically complex causes and effects * * *. Imagine for the moment something we might call an "effects map." To construct such a map, we mark the location of every event taking place at any specific moment, the "effects" of which will be felt in, say Singapore. An "effects map" would look something like the familiar nighttime satellite images of "The Earth from Space" * * *. Each point of light on the "effects map," however, would represent not an actual source of illumination but rather the location of an event or transaction whose effects were felt by some person, or institution, in Singapore.

Consider an effects map depicting a moment in 1450. Inasmuch as the effects of most activity taking place in 1450 declined rapidly with increasing geographical distance, most events or transactions having an effect in Singapore would themselves take place in, or around, Singapore. Our effects map would therefore show the territory around Singapore itself as a dense concentration of points, a small patch of intense light, with the remainder of the globe in almost total darkness.

An effects map for 1950 would undoubtedly show greater relative "brightness" *outside* of Singapore's borders, reflecting changes in communication and transportation technologies over the past several centuries, and the increased numbers of border-crossing events and transactions with widely dispersed geographical effects—"airplane crashes, mass torts, multistate insurance coverage, or multinational commercial transactions." Goldsmith, *Against Cyberanarchy, supra*, at 1234.

But the 1950 map would, I submit, retain its geographical coherence because the effects of most human activity in 1950, notwithstanding "mail, the telephone, and smoke signals," remained geographically constrained. There would still be a bright cluster of points down on the southern tip of the Malaysian peninsula. On the basis of this patch of relative brightness alone, we would probably be able to reconstruct those boundaries with reasonable accuracy without too much trouble, even if Singapore's actual political boundaries were omitted from our effects map.

However, an effects map plotting events and transactions taking place today in *cyberspace* would look very different from this. A plot of the location of all events and transactions taking place in cyberspace that have an effect on persons and property in Singapore will have virtually no geographical structure at all; points of light will be wildly scattered about the map, seemingly at random. It's a cliché, but it's true nonetheless: On the global network all points are (virtually) equidistant from one another, irrespective of their location in real space * * *. We would have much, much more trouble reconstructing Singapore's actual boundaries from a map limited to cyberspace events and transactions in 2002 than in any of our previous maps.

With respect to the "Effects Principle" at the heart of the Unexceptionalist argument * * * the world *has* changed, rather dramatically. Border-crossing events and transactions, previously at the margins of the legal system, of sufficient rarity to be cabined off into a small corner

of the legal universe ("airplane crashes, mass torts, multistate insurance coverage, or multinational commercial transactions") have migrated, in cyberspace, to the core of that system. * * *

A world in which virtually *all* events and transactions have border-crossing effects is surely not "functionally identical" to a world in which most do not, at least not with respect to the application of a principle that necessarily requires consideration of the distribution of those effects. A world in which Effects Principle returns the result "No Substantial Effects Outside the Borders" when applied to the vast majority of events and transactions is not "functionally identical" to a world in which application of the same principle to the vast majority of events and transactions returns the opposite result. A world in which, on occasion, bullets are fired from one jurisdiction into another is not "functionally identical" to a world in which all jurisdictions are constantly subjected to shrapnel from a thousand different directions.

Notes and Questions

1. Johnson and Post, and other "cyberspace exceptionalists" (or "regulation skeptics," as Professor Goldsmith calls them), make two fundamentally different arguments. First, they make a *descriptive* claim that online transactions *cannot* effectively be regulated by territorial sovereigns because of the ease with which cyberspace actors can relocate their activities beyond the reach of the enforcing sovereign. Thus, if a state wanted to regulate online gambling, a website devoted to gambling could simply relocate in another state (or outside the country) and still reach the same audience within the state. Second, they make a *normative* claim that it is *illegitimate* for territorial sovereigns to regulate activities beyond their borders. Do you agree with either or both claims? What are Goldsmith's responses to each claim?
2. If Johnson and Post are correct that territorial regulation will be impossible or normatively undesirable, what sort of entities will regulate online transactions? Would Johnson's and Post's answer be different from Goldsmith's?
3. Goldsmith argues that "it is legitimate for a nation to apply its regulation to an extraterritorial act with harmful local effects." Is this an adequate response to the challenge Johnson and Post raise?
4. Johnson and Post contend that content providers in cyberspace may be subject to multiple regulation in multiple jurisdictions around the globe. What is Goldsmith's answer to this problem? Is geographical tracking software the answer to the problem? How does a website operator—even assuming she could determine the location of all users—monitor access to the site so that it accords with every different local law? Does Goldsmith recognize this as a problem? How would he respond?
5. Goldsmith argues that cyberspace poses no new legal jurisdictional difficulties, given that cross-border interaction has been a reality for some time. What is Post's response to this argument? Which side do you find more convincing? Why?